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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DAYON D. LIVELY,

12 Plaintiff,

13 vs.

14 ROBERT TOVAR, et al.,

15 Defendant.

CASE NO. 11cv153-LAB (MDD)

**ORDER GRANTING UNOPPOSED
MOTION FOR JUDGMENT ON
THE PLEADINGS; AND**

ORDER TO SHOW CAUSE

16 On January 24, 2011, Plaintiff Dayon Lively, a prisoner in state custody, filed his
17 complaint in this action bringing claims pursuant to 42 U.S.C. § 1983. This matter was
18 referred to Magistrate Judge Mitchell Dembin for report and recommendation.

19 One Defendant, Afshid Nahavandi, moved to dismiss. Judge Dembin issued his report
20 and recommendation, recommending dismissing claims against that Defendant. On March
21 12, 2012, the Court adopted the unobjected-to report and recommendation and dismissed
22 claims against that Defendant. Then on May 24, 2013, the remaining served Defendants
23 moved for judgment on the pleadings or, in the alternative, for summary judgment. Judge
24 Dembin on June 19, 2013 issued the notice required under *Rand v. Rowland*, 154 F.3d 952
25 (9th Cir. 1998) (en banc) and *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), cautioning
26 Lively that he had to oppose the motion, that his written opposition had to be filed by July 22,
27 2013, and that failure to file an opposition could result in judgment being entered against
28 him.

1 Lively did submit a request for additional time to file an opposition to the motion for
2 summary judgment, but Judge Dembin on June 28 rejected it on a discrepancy order
3 (Docket no. 50), noting that the request was moot because an extension had already been
4 granted by the order containing the *Klinge* notice. The rejected document asked that the
5 June 28 hearing date be extended because Lively didn't receive the summary judgment
6 motion until about eighteen days after it was filed. Judge Dembin continued the June 28
7 hearing until August 12, which more than made up for the time Lively lost.

8 Lively never sought any additional extensions of time, nor did he object to any of
9 Judge Dembin's rulings. July 22 has come and gone, and Lively has not filed an opposition
10 or anything else. Although he is entitled to the benefit of the "prisoner mailbox rule," See
11 *Ugalde v. Chase*, 2013 WL 1183321, at *3 n.2 (D. Or., March 21, 2013) (noting that courts
12 have applied the "prisoner mailbox rule" to a variety of legal documents, including responses
13 to oppositions to summary judgment), an opposition mailed from the prison where Lively is
14 held should have arrived long before now.

15 The Court concludes that Lively does not intend to oppose the motion for judgment
16 on the pleadings or summary judgment. In view of this, there is no reason to require Judge
17 Dembin to issue a report and recommendation on Defendants' motion. The reference of this
18 motion to Judge Dembin is therefore **WITHDRAWN**, and the unopposed motion is
19 **GRANTED**. See Civil Local Rule 7.1(f)(e)(c) (providing that failure to file an opposition may
20 constitute consent to the motion's being granted). All claims against Defendants Mills,
21 Tovar, Kirby, Ko, Escribano, Abbott, Alvarado, and Carreno are **DISMISSED WITH**
22 **PREJUDICE**.

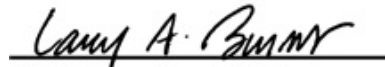
23 The only remaining Defendant is Sgt. Miguel Trujillo. Trujillo has not appeared or
24 waived service, nor has proof of service on Trujillo been filed. Since filing the complaint,
25 Lively has taken no steps to prosecute his claims against Trujillo. If Lively still wishes to
26 pursue claims against Trujillo, he must show cause for his failure to serve Trujillo and failure
27 to prosecute. He may do so by filing a memorandum of points and authorities not to exceed
28 five pages, no later than **August 26, 2013**, showing 1) either that he served Trujillo, or why

1 his failure to serve Trujillo should be excused; and 2) why his failure to prosecute claims
2 against Trujillo should be excused. Lively must show both, not just one. If he fails to show
3 cause within the time permitted, his remaining claims will be dismissed in accordance with
4 Fed. R. Civ. P. 4(m) and 41(b), and Civil Local Rule 41.1, and this action will be dismissed
5 with prejudice.

6 If Lively does not intend to pursue claims against Trujillo, he need not do anything,
7 and this action will be dismissed with prejudice.

8 **IT IS SO ORDERED.**

9 DATED: August 8, 2013

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11 **HONORABLE LARRY ALAN BURNS**
12 United States District Judge
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